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No. 87-994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL MOTORS CORPORATION and
AMERICAN NATIONAL RED CROSS,
Petitioners,

v.

WILLIAM M. BENNETT, CONWAY H. COLLIS,
ERNEST J. DRONENBERG, JR., RICHARD NEVINS,
GRAY DAVIS, and BRUCE BUNNER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

Of Counsel
STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CARL L. TAYLOR *
JOHNSON & SWANSON
Columbia Square
Suite 660 West
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 383-8760

WILLIAM B. MCCLURE, JR.
J. GORDON CHRISTY
JOHNSON & SWANSON
900 Jackson Street
Dallas, Texas 75202-4499
(214) 977-9000

Counsel for the Chamber of Commerce of the United States, Amicus Curiae

* Counsel of Record

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership consisting of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state

and local chambers of commerce. Many of the Chamber's members have established employee benefit plans. A central aspect of the Chamber's functions and activities is presenting its members' views on vital issues affecting business before all branches of the federal government. In this capacity the Chamber has participated as *amicus curiae* in a number of cases involving the interpretation of statutes governing the relations of labor and the business community.

The pre-emption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, at issue here broadly pre-empts state regulation and taxation of employee benefit plans subject to ERISA. The State of California is indirectly taxing employee benefit plans governed by ERISA. The chamber is disturbed by both the State of California's disregard of ERISA's preemption provisions and the effects that indirect state taxation will have on employee benefit plans by: (1) reducing the level of benefits to employees; (2) discouraging the establishment, growth, or development of benefit plans; (3) encouraging other states to take similar actions encroaching upon, incrementally diminishing, and detracting from the uniform and integrated scheme of regulation created by Congress.

If the decision of the Court of Appeals for the Ninth Circuit in *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305 (9th Cir. 1987) is not reversed, the Congressional policies sheltering employee benefit plans from state regulation and taxation and favoring the expansion, growth, development, and administrative efficiency of benefit plans will be undermined, and both employer and employee will suffer.

Because the Chamber is uniquely qualified to present to this Court the broad business perspective on this critical issue, it submits this brief in support of and urges the Court to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Section 514 of the ERISA precludes states from taxing benefit plans directly. The question in this case is whether Section 514 permits them to do so indirectly under the guise of a legal fiction, whereby benefit plan payments attributable to the sponsoring employer as opposed to an insurance company are deemed to be insurance premiums taxable to a plan's excess risk insurer.

Petitioners, General Motors Corporation and the American National Red Cross are fiduciaries and sponsoring employers of certain "employee welfare benefit plans" (employee disability and health care plans) within the meaning of 29 U.S.C. § 1002. Petitioners fund the plans from a combination of company assets and "excess-risk" policies from Metropolitan Life Insurance Company. Under the benefit plans petitioners fund all benefit claims out of company assets up to a certain annual aggregate level or trigger point. Metropolitan is responsible for paying any claims above this point under the "excess risk" policies. General Motors v. California Board of Equalization, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix p. 6a (filed December 14, 1987) (hereinafter cited as "App.").

The Constitution of the State of California at Cal. Cons. Art. XIII, § 28(c) empowers the State of California to tax "gross premiums received" by Insurance companies doing business in the state. In *Metropolitan Life Ins. Co. v. State Board of Equalization*, 32 Cal. 3d 649, 652 P.2d 426 (1982), the California Supreme Court held that for purposes of California state law "gross premiums" received by an insurance company include not only amounts paid by an ERISA plan or sponsoring employer to an insurer for an excess risk policy, but also the aggregate amount of benefits below the trigger point paid by employers under the benefit plan directly to their

employees and dependents out of plan assets. *Metropolitan Life Ins. Co. v. State Board of Equalization*, 652 P.2d at 433. The California court reached this result by concluding that for purposes of California state law the employer, in discharging plan benefit obligations, is a "mere agent" of the insurer that provides the excess risk coverage. 652 P.2d at 430.

Relying on the California Supreme Court's holding, Respondents levied taxes upon Metropolitan based not only upon the premiums received for the excess-risk policies and administrative functions but also upon the aggregate total of benefits paid out of Petitioner's employee benefit funds.[1]

Petitioners filed suit in federal court claiming the tax upon benefits paid directly out of plan funds below the trigger point was pre-empted by Section 514 of ERISA. The District Court agreed that State's action "related to" the benefit plans and was tantamount to taxing the benefit funds:

> The defendants are indirectly taxing benefit payments and they are impeding the discretion of plan sponsors to fund their plan guarantees through a combination of general assets and risk insurance.

General Motors v. California State Board of Equalization, 600 F. Supp. 76, 80 (C.D. Calif. 1984).[2]

The Court of Appeals for the Ninth Circuit agreed that the tax "relates to" benefit plans and "is computed on the basis of benefits paid by the plans." *General Motors v. California Board of Equalization*, 815 F.2d 1305,

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[1] These tax levies were passed on to the Petitioners as Metropolitan was indemnified by them.

[2] The District Court concluded that the legislative history of ERISA indicated that Section 1144(b)(5)(B)(i) was "directed to all [state] tax laws" and pre-empted California's *indirect* taxation of employee benefit plans. 600 F. Supp. at 80.

1309 (1987). The court, however, implicitly accepted for federal purposes the California Supreme Court's fiction that benefits paid are insurance premiums and concluded that the tax was saved from pre-emption because ERISA's pre-emption "saving clause," Section 514(b)(2)(A), "must be construed to cover *taxation* of insurance . . . for the tax is *intimately associated* with the business of insurance." *Id.* at 1310 (emphasis added). The court further concluded that the tax did not run afoul of the "deemer clause," section 514(b)(2)(B),[3] because the legal "*incidence*" of the tax fell on the insurance company not the plans. *Id.* at 1310. Although the court concluded that "elevating the incidence of the tax over the *effects* may be somewhat formalistic . . . it is the method *Metropolitan* [471 U.S. 724] *requires* us to employ in cases of this sort." *Id.* (emphasis added).

REASONS TO GRANT THE WRIT

The court of appeals' decision places employee benefit plans in a stark dilemma. If a plan uses services of an insurance company or is covered by an excess risk policy, a state can always interpret its insurance laws so as to deem all plan benefits paid to be insurance premiums for state law purposes, regardless of how such payments might be classified under traditional insurance economic analysis. A state can then tax the insurance company which will then pass the cost of the tax on to the plan. Faced with such a situation plans must either (i) have no connection whatsoever with insurance companies and

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[3] The "deemer clause" exempts from the saving clause any state law which purports to regulate insurance and which deems a benefit plan to be engaged in the "business of insurance." The court of appeals fails to address in its opinion how benefit plans can be "mere agents" of insurance companies in the collection of "premiums" (plan benefit payments) and not be deemed to be in the business of insurance.

thus "go naked" with respect to excess risk or (ii) reduce assets available for the payment of benefits by paying the passthrough of the tax from the insurance company. This dilemma results from permitting states to define what insurance is and what is to be deemed a premium, which they can always do in a way designed indirectly to tax plan benefits, and conflicts with the general congressional policy of protecting the security and viability of employee benefits plans and the specific policy of protecting those plans from state taxation. The state's action here affects the plans' administration and may affect benefit levels. The tax at issue here is passed back to the benefit plans by the insurer. This could well result in the employers' offsetting this tax by lowering benefit levels. Such an action is contrary to the congressional policy underlying ERISA of encouraging the growth of benefit plans.

Such a tax could result in employers adopting different benefit formulae for employees inside states which indirectly tax benefit plan payments. Employers would therefore be required to accommodate conflicting schemes in different states by structuring and administering their plans differently in each state in which they have employees.

> Such a situation would produce considerable inefficiencies, which the employer might choose to offset by lowering benefit levels. As the Court in *Shaw* indicated, "ERISA's comprehensive preemption of state law was meant to minimize this sort of interference with the administration of employee benefit plans," *ibid.*, so that employers would not have to "administer their plans differently in each State in which they have employees." *Id.*, at 105, 103 S.Ct., at 2904 (footnote omitted).
>
> * * * * *
>
> A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with

existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 107 S.Ct. 2211, 2217 (1987).

The incidence of the tax may fall upon insurers, but that is a distinction without a difference, because on its face the tax functions unambiguously as a tax on benefits paid directly out of employee benefit plans. The tax at issue is contrary to congressional intent and frustrates the policies underpinning ERISA. The devastating potential impact of the decision requires review and reversal by this Court.

The congressional policies undermined by the court of appeals' decision are expressed in the pre-emption provision, the provision exempting plans from state taxation and the deemer clause. The language and history of the insurance saving clause demonstrates that that provision does not vitiate the protection afforded by the first three provisions, and nothing in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) compels otherwise.

Congress clearly intended to pre-empt a state's ability to tax employee benefit funds. When ERISA was originally under consideration, Congress specifically rejected a recommendation from the Administration to remove state taxation from the pre-emption provision. Administration Recommendations to the House and Senate Conferees on H.R. 2 (April, 1974), *reprinted in* 3 Legislative History of ERISA 5050, 5147.

This intent was explicitly incorporated into ERISA by amendment in 1983. Section 514(b)(5)(B)(i) pre-empts "any state tax law relating to employee benefit plans."[4] The legislative history of this provision indi-

[4] The District Court below held that Congress intended Section 514(b)(5)(B)(i) to pre-empt state taxation of benefit plans, even if done indirectly as Respondents have done here. The Court of Appeals, however, never addressed Section 514(b)(5)(B)(i) in its decision.

cates that Congress intended to shield benefit plans from any form of state taxation, and that this intent was part of the original enactment. *See* House Conference Report No. 97-984, pp. 18, *reprinted in* U.S. Code Congressional and Administrative News, 1982, pp. 4580, 4603 ("Under the provision [514(b)(5)(B)(i)], preemption *is continued* with respect to (1) *any* State tax law relating to employee benefit plans . . .") (emphasis added). *See also Northwest Airlines Inc. v. Roemer*, 603 F. Supp. 7, 12 (D.C. Minn. 1984); *National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914 (D.C. Conn., 1978) (holding that § 1144(b)(5)(B)(i) pre-empts state tax laws "relating to" ERISA).

The court of appeals acknowledged that the tax law at issue "relate[s] to benefit plans." App. 11a. The tax law thus runs afoul of the express terms of section 514 (b)(5)(B)(i) as well as the general policy against state taxation of benefit plans.

Additionally, the tax law conflicts with the language and purpose of the "deemer" clause, 29 U.S.C. § 1144 (b)(2)(B) which prohibits any benefit plan from being "deemed" to be in "the business of insurance" for the purpose of "any state law purporting to regulate insurance companies."

The legislative history of Section 514 makes the precise scope of the deemer clause clear:

> . . . it is our belief that the general policy of Section 514(a), excluding state regulation relating to ERISA covered plans, should not be disturbed. However, *it may be necessary to narrow the* exceptions to this policy which are described in Section 514(b). It has come to our attention that our efforts to ensure minimum disruption of the regulatory efforts of the states in the fields of insurance, banking, and securities, generally are being construed to raise to the level of a reservation of state authority over employee benefit plans themselves. The argument is predicated on an interpretation of the language

". . . shall be deemed . . ." as used in Section 514(b)(2)(B) to limit the scope of the prohibition contained therein to the use by State authority of *a legal fiction* to declare a plan to be insurance, or a trust company, etc., where it is not. As this line of reasoning goes, those plans which actually contain the characteristics of insurance, etc., would then remain subject to state regulation.

Such interpretation, while artful, is not supported by a fair reading of the statute and legislative history. Faced with the conflicting and uncertain basis for regulation among the states, *the "deemed" language was utilized to create an irrebuttable presumption that these plans are not insurance, trust companies, etc., for purposes of state regulation.* As a drafting technique the "deemed" is used in Section 514(b) not to bar the use of a legal fiction by the states but to create what may amount to a legal fiction in a given circumstance. *The irrebuttable presumption would not be overcome even if an employee benefit plan engages in activities which bring it within the insurance, trust, or securities activities generally regulated by a state.*

H.R. Report No. 94-1785, Report of the ERISA Oversight Task Force on Welfare and Pension Plans (1976), *reprinted in* House Reports Vol. 3-1C (1976) (emphasis added).

Congress intended to create an "irrebuttable presumption" of pre-emption by virtue of the "deemer" clause to prevent a state's use of a "legal fiction" to regulate a benefit plan. By "deeming" benefit plans or their employer sponsors to be "mere agents" of insurance companies in the collection of "premiums" (plan benefit payments) which are constructively passed to the insurance companies,[5] the state has "deemed" the benefits plans to

[5] In reaching its conclusion that benefits paid by employers directly to employees pursuant to the terms of a benefit plan constitute premiums constructively received by the plan's excess risk insurers, the California Supreme Court held that the employee

be in the business of insurance in violation of the deemer clause. A state court's novel construction of state insurance laws cannot, however, be controlling under ERISA or else by means of legal fictions states can eviscerate ERISA's pre-emption provisions.

It is of no moment that California attempts to intrude indirectly through a tax on insurance companies rather than directly. "ERISA makes clear that even indirect state action bearing on private pension plans [benefit plans] may encroach upon the area of exclusive federal concern . . . ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision." *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 525 (1981). Pre-emption "requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

Despite the evident congressional intent to protect employee benefit plans from state taxation, the court of appeals misinterpreted section 514(b)(2)(A)—the insurance saving clause—to override the force of the pre-emption provisions. The court of appeals held that the saving clause "preserves the McCarran-Ferguson Act's reservation of the business of insurance to the states," and "McCarran-Ferguson, in turn preserves the states' ability to 'tax and regulate' insurance". App. 12a-13a.

Contrary to the court of appeals' reading of the saving clause, section 514(b)(2)(A) does not reserve the business of insurance to the states—it exempts from pre-emption state laws which "*regulate insurance.*" Nowhere

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benefit plans are "mere agents" of the excess risk insurers. *Metropolitan Life Ins. Co. v. State Board of Equalization*, 652 P.2d at 430. The court then concluded that these "agents" receive premiums from employees through the value of the employees' labor which somehow inures to the benefit of the excess risk insurer. *Id.* at 431-433.

does it exempt from pre-emption state laws which relate to "taxation." The McCarran-Ferguson Act itself specifically refers to the terms "regulation *or* taxation" and preserves both the "regulation" *and* "taxation" of the business of insurance to the states (20 U.S.C. § 1012(a), (b)).

This Court recently noted that "Congress' choice of language is significant" in ERISA. *Fort Halifax Packing Co. Inc. v. Coyne*, 107 S. Ct. at 2216.[6] The saving clause of ERISA's pre-emption provision does *not* refer to state laws relating to "taxation" but to state laws which "regulate" insurance. The words "tax" and "regulate" are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. There is a distinct difference between a law which "taxes" and one which "regulates." Congress' use of only the latter in the saving clause is significant.[7] Therefore,

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[6] The Court noted that "ERISA's pre-emption provision does not refer to state laws relating to 'employee benefits,' but to state laws relating to 'employee benefit *plans*.'" "The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic differences between a benefit and a plan, Congress' choice of language is significant in its pre-emption of only the latter." (107 S. Ct. at 2216).

[7] While ERISA was under consideration by Congress it was assigned to the chief tax writing committee of each house (the Senate Finance Committee and the House Ways and Means Committee), and to the Joint Committee on taxation as well as to each house's respective labor committee.

The "ERISA Oversight Task Force on Welfare and Pension Plans" in its Report to Congress reiterated Congress' specific intent to *narrowly limit* the "saving clause" exception to preemption.

> There was a recognition of the necessity for the preservation of some state activity in this field and certain limited exceptions were made to the broad preemption scheme.
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> * * * *
>
> These exceptions are designed to delineate affirmatively the limits of the "field" preempted by section 514(a), H.R. Report No. 94-1785, pp. 46-47 (1976).

by its very terms the saving clause of ERISA's pre-emption applies only to state laws which "regulate" insurance.

Moreover, for purposes of federal law the tax at issue does not relate to the business of insurance. This Court has stated that for purposes of federal law one element of whether a practice is part of the "business of insurance" and therefore subject to state regulation is whether there is a "transferring or spreading of a policyholder's risk." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). A "fundamental principle of insurance [is] that the insurance *policy* defines the scope of the risk assumed by the insurer from the insured." *Id.* at 131 (emphasis added). The insurer here bears *no* risk for payments below the trigger level—these remain the sole obligation of the employers' benefit plans. The only risk the insurer bears is under the excess risk policy it issued. *See, e.g.*, the well reasoned dissenting opinion of Mr. Justice Kaus of the California Supreme Court in *Metropolitan Life Ins. Co. v. State Board of Equalization*, 652 P.2d at 433. Therefore, as a matter of federal law and ERISA only the premiums for this excess risk policy are taxable by the state.

Finally, contrary to the court of appeals' assertion, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), does not "require" permitting states to tax benefit plans if the initial incidence of the tax falls on insurance companies and not plans. *Metropolitan Life* involved state regulation of the *content* of insurance policies offered by insurance companies for sale, an area of traditional state insurance regulation. ERISA does not purport to prescribe the substantive content of employee welfare benefit plans, 471 U.S. at 732, and the state law concerning the content of an insurance policy purchased by such a plan thus did not conflict with any countervailing federal policy. Here by contrast the state law directly conflicts with and negates a specific and im-

portant federal policy, explicitly in other legislative provisions, against state taxation of plans.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce, *amicus curiae*, respectfully suggests that the Court grant the petition for writ of certiorari and reverse the court of appeals' decision.

Respectfully submitted,

Of Counsel
STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CARL L. TAYLOR *
JOHNSON & SWANSON
Columbia Square
Suite 660 West
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 383-8760

WILLIAM B. MCCLURE, JR.
J. GORDON CHRISTY
JOHNSON & SWANSON
900 Jackson Street
Dallas, Texas 75202-4499
(214) 977-9000

Counsel for the Chamber of Commerce of the United States, Amicus Curiae

* Counsel of Record

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